No. 85-1790

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1985

THE COOPER UNION FOR THE ADVANCEMENT OF SCIENCE AND ART,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD and COOPER UNION FEDERATION OF COLLEGE TEACHERS, AFT, NYSUT, AFL-CIO,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE COOPER UNION FEDERATION OF COLLEGE TEACHERS, AFT, NYSUT, AFL-CIO, IN OPPOSITION

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Question Presented

Was the finding of the National Labor Relations Board (as affirmed by the court below), that certain college faculty members were not managerial employees, supported by substantial evidence where the faculty did not generally exercise effective recommendation or control in either academic or nonacademic areas, although they did have "significant" authority in some core academic areas?

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Statement of the Case

As cogently summarized by the circuit court panel in the decision below, the nature of the parties[1] and the events leading to the instant litigation are as follows[2]:

1. The parties to the proceeding below were:

(a) National Labor Relations Board ("NLRB" or "the Board")—petitioners below and respondent in this Court;

(footnotes continued on next page)

Cooper Union is a private, non-profit, tuition-free institution of higher education located in Manhattan, consisting of three degree-granting schools: The Schools of Art, Architecture, and Engineering. Cooper Union has a student body of approximately 900 to 1,000 students and employs approximately fifty-five to sixty full-time and eighty part-time faculty members. The Cooper Union Charter vests ultimate authority in a sixteen-member board of trustees, a board which has no faculty representatives on it.

In 1974, following an NLRB-supervised election, the Cooper Union Federation of College Teachers, AFT, NYSUT, AFL-CIO ("the Union") was certified to represent a unit of full-time faculty members and librarians. Part-time (adjunct) faculty, deans, assistant deans, division heads, and the library head were excluded from the bargaining unit. In 1978 the Union and Cooper Union entered into their only collective bargaining agreement, which expired in August, 1980. Shortly before this expiration date, and following the Supreme Court's decision in *NLRB* v. *Yeshiva University*, 444 U.S. 672 (1980), Cooper Union withdrew its recognition of the Union and refused to bargain with it.

An administrative law judge dismissed a complaint against Cooper Union that charged it with unfair labor practices under section 8(a)(5) and (1) of the National

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(b) The Cooper Union for the Advancement of Science and Art ("Cooper Union" or "the Administration")—respondent below and petitioner in this Court. and

(c) Cooper Union Federation of College Teachers, affiliated with American Federation of Teachers, New York State United Teachers, AFL-CIO ("the Union")—intervenor below and respondent in this Court.

2. In this brief, all citations to the opinion of the United States Court of Appeals for the Second Circuit and the decision of the National Labor Relations Board will be to the opinion and decision as reproduced in petitioner's Appendix ("Pet. App.") at pages 1-8 and 10-28 respectively.

> Labor Relations Act ([''NLRA or] ''the Act''), 29 U.S.C. § 158(a)(5) and (1) (1982). He concluded that the full-time faculty were managerial employees within the meaning of *Yeshiva,* and therefore outside the protections of the Act. The Board reversed the ALJ, finding that the bargaining unit members did not exercise sufficient authority over academic matters to be considered managerial employees under *Yeshiva.*

Pet. App. 3-4 (footnote omitted).

In reaching its decision, the unanimous Board panel relied on the ineffectiveness of the faculty's voice in academic decision making, the administration's frequent disregard of the faculty's recommendations regarding appointment, promotion and tenure, and the absence of any faculty role in such crucial non-academic areas as budget, facilities and personnel (Pet. App. 26-27). Consequently, the Board found that petitioner's withdrawal of recognition of (and subsequent refusal to bargain with) the Union violated Sections 8(a)(5) and (1) of the Act (Pet. App. 27).

A unanimous panel of the United States Court of Appeals for the Second Circuit, in a *per curiam* decision, granted the Board's petition for enforcement of its bargaining order. It noted that petitioner's faculty members had ''significant authority in certain core academic matters, but certainly not the 'absolute' authority of *Yeshiva's* faculty, nor even 'effective recommendation or control.' '' (Pet. App. 6, *quoting NLRB* v. *Yeshiva University,* 444 U.S. at 686 and 683 n.17). Furthermore, the court emphasized, ''we would have to ignore the extensive evidence of conflict and of broad administrative authority to implement changes over faculty opposition in core academic areas such as curriculum to find that the Cooper Union faculty is

'aligned with management.' " (Pet. App. 8, *quoting NLRB* v. *Yeshiva University*, 444 U.S. at 683). The court therefore held that substantial evidence in the record as a whole supported the Board's finding that petitioner's faculty were not "managerial employees" since they did not exercise effective recommendation or control in either academic or non-academic areas (Pet. App. 8).

ARGUMENT

I.

THE BOARD AND THE COURT BELOW PROPERLY APPLIED THE PRINCIPLES ENUNCIATED BY THIS COURT IN *NLRB* v. *YESHIVA UNIVERSITY*.

Although the Act does not explicitly exclude managerial employees, as it does supervisors, *see* 29 U.S.C. § 152(3), this Court, in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 289 (1974), held that the NLRA implies such an exclusion. It was not until *NLRB* v. *Yeshiva University*, 444 U.S. 672 (1980), though, that the Court actually applied the *Bell Aerospace* exclusion to a specific group of employees.

In *Yeshiva*, the NLRB certified the Yeshiva Faculty Association as the collective bargaining representative for the university's full time faculty (including assistant deans and department chairmen). *NLRB* v. *Yeshiva University*, 444 U.S. at 678-79. This Court ruled, however, that because the unit members were "managerial employees" they were exempt from the coverage of the NLRA.

In reaching its decision, the Court majority relied on the extensive authority of the faculty in both academic and non-

academic matters. As this Court noted, the Yeshiva faculty's "authority in academic matters is absolute." *NLRB* v. *Yeshiva University*, 444 U.S. at 686. For example, they determined the curriculum, grading system, and matriculation standards, decided which students would be admitted, and established course schedules. *Id.* In addition, the faculty in *Yeshiva* also played "a predominant role in faculty hiring, tenure, sabbaticals, termination and promotion." *Id.* at 686 n.23. Further, "on occasion their views have determined the size of the student body, the tuition to be charged and the location of a school." *Id.* at 686. Therefore, "[T]o the extent the industrial analogy applies, the faculty determines within each school the product to be produced, the terms upon which it will be offered and the customers who will be served." *Id.* As such, this Court concluded, "the faculty of Yeshiva University 'in effect, substantially and pervasively operat(e) the enterprise' ", *Id.* at 691, *quoting NLRB* v. *Yeshiva University*, 582 F.2d 686, 698 (2d Cir. 1978), and consequently exercise authority "which in any other context unquestionably would be managerial." *NLRB* v. *Yeshiva University*, 444 U.S. at 686. It was this pervasive control that led this Court to conclude that unionization of the Yeshiva faculty would create an unacceptable risk of the kind of divided loyalty the managerial exclusion was intended to avoid. *Id.* at 682, 683 n.17, 684, 687-88, 689-90.

At the same time, this Court acknowledged, "[t]here may be some tension between the Act's exclusion of managerial employees and its inclusion of professionals . . . ." *NLRB* v. *Yeshiva University*, 444 U.S. at 686; *accord. ibid* at 692 (Brennan, J., dissenting). The Court majority thus cautioned against "an application of the managerial exclu-

sion that would sweep all professionals outside the Act in derogation of Congress' expressed intent to protect them." *Id.* at 690. Indeed, in a similar context, this Court subsequently reaffirmed that it would be "extraordinary to read an implied exclusion for . . . employees into the statute that would swallow up and displace almost the entirety of the professional-employee inclusion." *NLRB* v. *Hendricks County Rural Electrical Membership Corp.*, 454 U.S. 170, 185 (1981). Accordingly, this Court expressly noted that there "may be institutions of higher learning unlike Yeshiva where the faculty are entirely or predominantly nonmanagerial" as well as "faculty members at Yeshiva and like universities who properly could be included in a bargaining unit." *NLRB* v. *Yeshiva University*, 444 U.S. at 691 n.31.

Hence, this Court refined its definition of "managerial employees" (*i.e.*, "those who formulate and effectuate managerial policies by expressing and making operative the decisions of their employer") that it had adopted in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 288 (1974), *quoting Palace Laundry Dry Cleaning Co.*, 75 NLRB 320, 323 n.4 (1974) (*quoted in NLRB* v. *Yeshiva University*, 444 U.S. at 682). In addition, this Court declared: "managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management." *NLRB* v. *Yeshiva University*, 444 U.S. at 683. As such, "professors may not be excluded because they determine the content of their own courses, evaluate their own students, and supervise their own research." *Id.* at 690-91 n.31. Therefore, "[o]nly if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management." *Id.* at 690.

In the instant matter, the Board and the court below properly applied the standards set forth in the *Yeshiva* decision. For example, in concluding that the Cooper Union faculty were not managerial employees, the unanimous Board panel explained:

> Although the [petitioner's] faculty clearly exercise considerable authority in academic areas such as curriculum, admissions, academic standards, course assignments, and scheduling, such authority not only is not absolute as was the authority of the *Yeshiva* faculty, but frequently has been made ineffective by the administration. Of particular significance in this regard are the administration's creation and elimination of entire degree programs without faculty input or over faculty opposition, the exclusion from academic governance of a large proportion of the faculty for a number of years, the amendment of governances without faculty vote, creation of a special admissions program without faculty approval, and the key roles played by administrators in chairing the faculties, chairing the joint faculty, chairing the administrative committees, and participating actively in other committees. . . . [While the] faculty members are actively involved in making more routine academic decisions such as the substitution of one course for another and, in the Schools of Art and Architecture, the admission of individual applicants . . . [i]t is clear that the Cooper Union faculty have considerably less effective authority in the academic sphere than did the faculty in *Yeshiva* and the faculties in various Board decisions following *Yeshiva* in which the faculty have been held managerial. Moreover, unlike the *Yeshiva* faculty and the faculties involved in subsequent Board decisions, the Cooper Union faculty lacks substantial input into non-academic matters such as budget, facilities planning, and personnel decisions. In this regard we note particularly that decisions on the

> hiring, promotion, tenure, and retention of teaching staff are frequently made in the absence of faculty recommendations, and when they are made following faculty recommendations, those recommendations are frequently rejected.

Pet. App. 26-27 (footnotes omitted).

Therefore, based upon the ineffectiveness of the faculty's voice in academic decision-making, the administration's frequent disregard of the faculty's recommendations regarding appointments, promotion and tenure, and the absence of any faculty role in such crucial non-academic areas as budget, facilities and personnel, both the Board and the court below correctly concluded that petitioner's full time faculty were not managerial employees.

II.

THERE IS NO SPLIT AMONG THE CIRCUIT COURTS OVER THE PROPER APPLICATION OF *YESHIVA*.

In seeking a writ of certiorari, petitioner purports that the circuit courts are in conflict in applying the standards set forth by this Court to determine whether or not particular college faculty members are managerial employees (Pet. 6-11). Yet, none of the circuit courts have recognized the existence of such a split. Moreover, scrutiny of the circuit court decisions reveals that not only are the facts in *NLRB* v. *Lewis University*, 765 F.2d 616 (7th Cir. 1985) clearly distinguishable from those in *Loretto Heights College* v. *NLRB*, 742 F.2d 1245 (10th Cir. 1985) and the present matter, but the underlying rationales in all of these cases are in harmony as well.

For example, in holding a unit of faculty members (including, unlike here, department chairpersons) to be managerial employees excluded from coverage under the NLRA, a Seventh Circuit panel majority noted that: "The full-time faculty, through their collective participation on faculty committees, as departmental chairpersons, and as members of the "faculty convened", determine student admission policies, graduation requirements, grading guidelines, curriculum changes, degree offerings, academic calendar matters, faculty tenure, faculty promotions, and faculty hiring within the college." *NLRB* v. *Lewis University*, 765 F.2d at 628.

"In stark contrast", the *Lewis* court observed:

> Loretto Heights College did not have a "faculty convened" that approved proposals and recommendations emanating from the faculty committees. Instead, the proposals of faculty committees at Loretto Heights were submitted directly to the administration and underwent several levels of administrative review. The court in *Loretto Heights* found that "faculty power at the College, whatever its extent on paper, is in practice severely diluted," as evidenced by the infrequent, insignificant work of faculty committees, the faculty's limited decision-making authority, and the several layers of administrative review.

NLRB v. *Lewis University*, 765 F.2d at 628, (footnote omitted) *citing Loretto Heights College* v. *NLRB*, 742 F.2d at 1254. Consequently, the majority dismissed the dissenter's assertion that its disposition of the case before it created a conflict with the Tenth Circuit as having "no basis in law or fact". *NLRB* v. *Lewis University*, 765 F.2d at 628.

The facts in the instant case are similarly distinguishable from those present in *Lewis*. For example, while the

faculty at Lewis University elected their own department chairpersons, *NLRB* v. *Lewis University*, 765 F.2d at 622, petitioner's president vetoed a governance amendment passed by the faculty of its then School of Art and Architecture which would have required faculty election of division heads (Pet. App. 15 n.5). In addition, over an eight year period, only five of 118 faculty committee recommendations for tenure and promotion were rejected by the Lewis University administration. *NLRB* v. *Lewis University*, 765 F.2d at 623. At Cooper Union, by contrast, faculty tenure and promotion recommendations were frequently rejected (Pet. App. 7, 21). Furthermore, through its exclusive participation in the Budget Review Committee, the Lewis University faculty exercised effective control of the university's fiscal affairs. *NLRB* v. *Lewis University*, 765 F.2d at 622-23. Cooper Union faculty, however, had virtually no role in the areas of budget and facilities (Pet. App. 7, 21). Moreover, while proposed bargaining unit members at Lewis University effectively determined sabbatical leaves, *NLRB* v. *Lewis University*, 765 F.2d at 624, petitioner exercised exclusive authority in making leave of absence and sabbatical determinations (Pet. App. 7-8, 21).

Most importantly, in Cooper Union there is simply no faculty instrumentality even remotely resembling the "faculty convened" at Lewis University (composed of all full-time faculty) which was responsible for "the formulation of all major educational policies at the College." *NLRB* v. *Lewis University*, 765 F.2d at 622. Indeed, as elaborated in greater detail in Part III, *infra*, petitioner's portrait of Cooper Union as an institution operated under a traditional collegial model of decision-making is manifestly belied by the actual facts of this case. Therefore, petitioner's re-

liance on the Seventh Circuit panel's emphasis on "[t]he collegial decision-making process that pervades a university such as Lewis" is clearly misplaced. *NLRB* v. *Lewis University*, 765 F.2d at 626.

Unlike the factual differences between *Lewis University*, on the one hand, and *Loretto Heights College* and *Cooper Union* on the other, the legal analyses employed by the circuit courts in the three post-*Yeshiva* cases are remarkably similar. For example, notwithstanding petitioner's contrary assertion (Pet. 9), the Second Circuit did *not* find the faculty of Cooper Union to be non-managerial merely because they constituted a minority on various committees. Rather, the Second Circuit's holding is obviously bottomed on petitioner's refusal to afford its faculty *any* meaningful role in a variety of core academic areas (Pet. App. 6-7 & nn.3-5).

Petitioner's claim that the *Loretto Heights* and *Cooper Union* courts placed undue emphasis on non-academic matters in deciding that the respective faculties were not managerial employees (Pet. App. 9-10), is equally spurious. As the Tenth Circuit declared:

> Since the 'business of a university is education,' we must focus our attention on the faculty's role in academic affairs in order to determine the question of managerial status.

Loretto Heights College v. *NLRB*, 742 F.2d at 1252 (footnote omitted), *quoting NLRB* v. *Yeshiva University*, 444 U.S. at 688. Likewise, in the case at bar, the Second Circuit actually held that "the Cooper Union faculty did not exercise effective recommendation or control" in *either* academic or non-academic areas (Pet. App. 8).

Finally, despite petitioner's semantic legerdemain (*see*, Pet. 10-11), the standard employed by each of the circuit courts in determining the degree of authority necessary to confer managerial status on college faculty members was the same. Pursuant to *Yeshiva*, all three courts focused on whether or not the respective faculties possessed "effective recommendation or control." *NLRB* v. *Yeshiva University*, 44 U.S. at 683 n.17. *Compare*, Pet. App. 8, *with Loretto Heights College* v. *NLRB*, 742 F.2d at 1254, and *NLRB* v. *Lewis University*, 765 F.2d at 627. As such, there is no need for this Court to resolve a mythical split amongst the circuits.

III.

THE FACTS OF THIS CASE RENDER IMMATERIAL THE ISSUE RAISED BY PETITIONER.

Even assuming *arguendo* that inconsistencies of analyses by the circuit courts imaginably exist, resolution of the question presented by petitioner would provide little, if any, guidance to the Board or the circuit courts in applying the principles enunciated by this Court in *Yeshiva*. In particular, a standard that faculty members who exercise "significant . . . authority in academic matters" are managerial employees merely invites further litigation as to: a) the meaning of "significant authority"; b) what is or is not an "academic matter"; and c) the relative weight to be assigned particular academic matters where faculty power over such components varies widely.

Apparently cognizant of the nebulousness of the issue it purports to raise, petitioner ultimately reveals the actual

rule of law it seeks this Court to endorse. Thus, petitioner avers that only when "the actual structure of an institution has more in common with the industrial model than with the traditional collegial model can it be justifiable to treat faculty members as non-managerial employees subject to the National Labor Relations Act" (Pet. at 12-13). Respondent Union submits, however, that petitioner's "structural" standard is a radical and unwarranted departure from this Court's "operational" standard which is at the core of the managerial employee exclusion. *See, NLRB* v. *Bell Aerospare Co.*, 416 U.S. 267, 290 n.19 (1974) ("[T]he question whether particular employees are 'managerial' must be answered in terms of the employees' actual job responsibilities, authority, and relationship to management").

Moreover, if the structure of an institution were of paramount importance in determining the managerial status of particular employees, one would assume that managers play a substantial role in defining that structure. Yet, the record in this case is replete with instances where the only role the faculty played in determining petitioner's structure was that of *adversary*. Therefore, even under the inappropriate rule petitioner advocates, petitioner's claim still fails.

In concluding that the Cooper Union faculty are nonmanagerial, both the Board and the court below relied, in large part, on an extensive history of faculty-administration conflict as demonstrated by a long pattern of administrative actions taken over strong and persistent faculty opposition. As such, unlike *Yeshiva* where "[t]he university was in effect compelled to rely upon the faculty for advice, recommendations, establishment of policies and implemen-

tation of policies'', *Loretto Heights College* v. *NLRB*, 742 F.2d 1245, 1254 (10th Cir. 1984), in the case at bar, petitioner often made decisions without faculty input and, in many important instances, over faculty objections. For example, both the Board and the court below found the following:

1. In 1972, the Board of Trustees eliminated the existing departmental structure over faculty objection and created new degrees in mathematics and science without faculty input (Pet. App. 6 n.3, 15-16).

2. In 1973, the administration implemented changes that included increasing class size, the student-faculty ratio, and teaching loads, severely limiting tenure grants, reducing the number of faculty through attrition, and increasing the proportion of adjunct faculty. These changes were implemented while still under consideration by the student-faculty Senate (Pet. App. 6 n.3, 16).

3. In 1975, without faculty participation and over strong faculty opposition, the Trustees eliminated the divisions and divisional heads and created a new ''faculty of liberal arts and science'' entirely outside the degree-granting schools thereby effectively disenfranchising almost half the faculty since they no longer had a vote on the faculties of any of the degree-granting schools and were unable to participate in the governance committees (Pet. App. 6 n.4, 16).

4. In the 1975 restructuring, the Trustees also eliminated the curricula leading to degrees in mathematics, physics, and distributive science resulting in the permanent layoff of eight tenured faculty members (Pet. App. 6 n.4, 16).

5. In 1975, the dean of the School of Engineering, without faculty consideration, eliminated the administrative committtee, delegating all administrative functions to the dean (Pet. App. 7 n.5, 17).

6. In 1975, the Faculty Senate voted to cease meeting because it was a group without any power and remained defunct for approximately three years thereafter (Pet. App. 8, 17).

7. In 1977, over strong faculty opposition, Cooper Union entered into a library consortium that delegated administrative control and purchasing to New York University (Pet. App. 7 n.5, 17).

8. For four years petitioner's president refused to call any institution-wide joint faculty meetings. Between 1977 and 1981, the dean of the School of Architecture prevented that School's administrative committee from meeting by simply failing to call any meeting thereby bypassing the administrative committee's role in reviewing proposed curriculum changes (Pet. App. 20-21, *see*, Pet. App. 6-7).

9. In 1978, a report by the Middle States Association of Colleges and Schools, an accrediting agency, found that Cooper Union's deans were unusually strong and the faculty were unusually weak and noted the absence of any provision for faculty review of institution-wide academic policies (Pet. App. 8 n.6, 18).

Clearly then, in marked contrast to the apocryphal vision of a tranquil "community of scholars" portrayed by peti-

tioner, a fair appraisal of the record in this case reveals a picture of chronic conflict redolent of classic industrial strife. Consequently, even if the issue in this case is set forth on petitioner's own terms, petitioner should not prevail. Indeed, respondent Union submits that it was precisely because of the type of turmoil so evident in the case at bar that Congress enacted the National Labor Relations Act and deliberately chose to grant professional employees the right to participate in the collective bargaining process.

It is axiomatic that "[w]hile this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial not simply administrative or managerial." *"SS Monrosa"* v. *Carbon Black Export Inc.*, 359 U.S. 180, 184 (1959). Thus, even if a conflict among the circuits as to the proper application of *Yeshiva* can be presently divined, this case is simply not an adequate vehicle for resolving the alleged problem. Accordingly, it is respectfully submitted that there is no need for this Court to resolve a hypothetical question not squarely presented here.

Conclusion

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
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